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Supreme Court, U.S.
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In The

Supreme Court of the United States

LEE O. WILSON, JR., PETITIONER,

v.

GENE M. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1915(e)(1) of Title 28 authorizes district courts to appoint counsel in a civil case for parties who cannot afford counsel. All thirteen courts of appeals have addressed whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and one court of appeals has held that appellate jurisdiction depends upon the type of claim presented. The question presented is:

Whether the denial of the appointment of counsel in a civil case is an order that is immediately appealable.

PARTIES TO THE PROCEEDING

Petitioner is Lee O. Wilson, Jr.

Respondents are Gene M. Johnson, Director, Virginia Department of Corrections; Doris Ewing, Supervisor, Court and Legal Services; Edward Meeks, Superintendant, Cold Springs Work Center.

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PETITION FOR A WRIT OF CERTIORARI

Lee O. Wilson, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court denying the appointment of counsel (App., *infra*, 3a-5a) is unreported.

JURISDICTION

On June 29, 2009, the United States District Court for the Eastern District of Virginia denied petitioner's request for appointed counsel. App., *infra*, 3a-5a. On appeal, the Fourth Circuit dismissed the case, holding that it lacked appellate jurisdiction. App., *infra*, 2a. The court of appeals entered its judgment on November 24, 2009. On February 16, 2010, Chief Justice Roberts granted an extension of time within which to file a petition for a writ of certiorari to and including March 24, 2010.

For the reasons explained below, the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and exists whether or not the court of appeals had appellate jurisdiction. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 & n.23 (1982).

STATUTORY PROVISIONS INVOLVED

Section 1915 of Title 28 of the United States Code provides in relevant part:

> (e)(1) The court may request an attorney to represent any person unable to afford counsel.

Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

This case presents the question whether a pro se party who cannot afford counsel, and who is denied appointed counsel by a district court, can appeal immediately, or whether (as the court below held) he must go through the entire district court case without an attorney—with only the prospect of appellate review of the denial of counsel after final judgment is entered. In the meantime, under the approach of the

court below, he must hope that his unfamiliarity with law and procedure do not irrevocably prejudice the merits of the case, such that any subsequent appellate review of the denial of counsel lacks meaning. All thirteen courts of appeals have addressed the question whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals, including the court below, have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and the Ninth Circuit has held that it depends upon the type of claim presented.

If petitioner's case fell within the jurisdiction of the Fifth, Eighth, or Federal Circuits, he would have had a right to immediately appeal the denial of his request for appointed counsel. But because his case is pending within the Fourth Circuit, he must proceed alone to final judgment on the merits of his case, without the benefit of counsel, before he can challenge the denial of his request.

This divergent treatment in the courts of appeals will not be resolved without this Court's intervention, and this petition presents the Court with an opportunity to address an issue that has long evaded review.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress has given district courts the authority to appoint counsel in civil lawsuits when a person is unable to afford an attorney, as well as in a swath of civil rights lawsuits. *See, e.g.*, 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."); 42 U.S.C. §§ 2000a-3(a) ("the court may appoint an attorney" for a complainant seeking an injunction under the civil rights laws); 2000e-5(f)(1)(B) ("the court may appoint an attorney" for a Title VII complainant). In enacting these provisions, Congress understood that lawsuits often involve parties of "unequal strength and resources" in which one party "has at his disposal a vast array of resources and legal talent." H.R. Rep. No. 92-238, at 12 (1971). By authorizing the appointment of counsel in such circumstances, Congress created a means for the court to place the parties on more equal footing in the appropriate case.

2. Title 28 U.S.C. § 1291 grants jurisdiction to the courts of appeals over "all final decisions of the district courts." This statute has been interpreted to provide that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

For more than a half-century, however, this Court has recognized that a "practical construction" of the

final judgment rule permits immediate appellate review over a "small class" of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978). To fit within this class, an "order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

B. Factual Background And Proceedings Below

1. Petitioner, an individual proceeding pro se, filed an action in the United States District Court for the Eastern District of Virginia seeking damages against certain state officials under 42 U.S.C. § 1983. Petitioner alleged that respondents unconstitutionally caused him to spend an extra five months in prison based on their misreading of his state court sentencing order, which was the result of a plea bargain. At the time petitioner filed this suit, he already had served the entirety of that prison sentence (including what he alleged to be the unwarranted five months), although he had returned to prison for a separate offense. App., *infra*, 8a-9a & n.2.

On February 27, 2007, seven days after the complaint was filed and before any additional filings were made in the case, the district court sua sponte

dismissed the case. The court held that petitioner could not maintain a Section 1983 damages claim until after he successfully challenged his confinement in a habeas petition under 28 U.S.C. § 2254. Petitioner appealed.

2. On appeal, and after informal briefs were filed, the Fourth Circuit appointed counsel to represent petitioner for the purposes of the appeal. App., *infra*, 3a-4a.

In a published opinion, the court of appeals reversed and remanded to the district court. The court of appeals held that petitioner's Section 1983 claim for unconstitutional imprisonment was the appropriate means to seek relief. App., *infra*, 18a-20a. Because petitioner's sentence had expired, the court of appeals recognized that a Section 1983 claim was petitioner's only avenue to relief and explained that it did "not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." App., *infra*, 19a.

Respondents sought rehearing en banc, which the court of appeals denied. Respondents did not seek review from this Court.

3. On remand, petitioner again proceeded pro se, because the Fourth Circuit's appointment of appellate counsel did not extend to the district court.

On December 1, 2008, petitioner filed a motion requesting to proceed in forma pauperis and, on

February 23, 2009, petitioner filed a motion requesting the appointment of counsel. App., *infra*, 3a. On April 23, 2009, the district court granted petitioner's motion to proceed in forma pauperis, but did not act on his request for the appointment of counsel. Petitioner renewed his motion for the appointment of counsel on June 19, 2009.

On June 23, 2009, respondents filed an answer to the complaint in which they asserted fourteen defenses, and filed a motion for summary judgment supported by a 17-page legal memorandum and a number of exhibits. Three days later, petitioner opposed the motion for summary judgment pro se.

On June 29, 2009, the district court denied petitioner's original and renewed motions for appointment of counsel. App., *infra*, 3a-5a. The court recognized that pursuant to 28 U.S.C. § 1915(e)(1), a "court may request an attorney to represent an indigent plaintiff proceeding *in forma pauperis*." App., *infra*, 3a-4a. The court nevertheless found that the appointment of counsel was limited to cases where "exceptional circumstances" exist, and found that petitioner had made no showing that exceptional circumstances existed to warrant the appointment of counsel. App., *infra*, 4a. Notwithstanding the appointment of counsel in the court of appeals and the reversal in a published opinion of the district court's prior sua sponte dismissal of the case, the district court explained that the appointment of counsel was unnecessary because petitioner "ably filed his pleadings and replied to the various orders, as well as

demonstrated comprehension of the procedures and laws of this Court." App., *infra*, 4a.

4. Petitioner appealed the denial of appointment of counsel, but the court of appeals dismissed the appeal. Consistent with its past holdings, the Fourth Circuit held that it lacked appellate jurisdiction over the appeal because an order denying appointment of counsel "is neither a final order nor an appealable interlocutory or collateral order." App., *infra*, 2a.

The district court has not yet ruled on the merits of petitioner's case.

REASONS FOR GRANTING THE PETITION

THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE IMPORTANT ISSUE OF WHETHER THE DENIAL OF APPOINTMENT OF COUNSEL IN A CIVIL CASE IS AN IMMEDIATELY APPEALABLE ORDER

This is the rare instance in which the question presented has been addressed by *every* federal court of appeals, those courts are divided, and there is no indication that the courts of appeals will come to a single result absent this Court's intervention. On that basis alone, certiorari should be granted. But the question in this case also is a significant one—one that members of this Court have in the past urged the Court to address and that the leading treatise on federal practice and procedure has explained is in need of resolution by this Court. The issue is important to the nation's system of justice, as it touches

upon the core question of when a party who cannot afford an attorney should be appointed one by the court. The denial of counsel unquestionably affects every subsequent litigation decision in a case. After final judgment, it is virtually impossible to distinguish on review between missteps caused by the lack of counsel and any inherent weaknesses in the merits of a case. And, because this issue involves pro se litigants navigating trial and appellate courts, this is an issue that evades review by this Court. This petition likely presents one of the few opportunities this Court will have to address the question presented.

A. This Case Squarely Implicates A Circuit Conflict Involving Every Court Of Appeals That Will Not Be Resolved Absent This Court's Intervention

1. Three courts of appeals permit immediate appeals of orders denying the appointment of counsel

In conflict with the ruling below, the Fifth, Eighth, and Federal Circuits all have held for more than 20 years that a party denied the appointment of counsel in a civil case can immediately appeal that order. *See Lariscey v. United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405, 407 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984).

Unlike the Fourth Circuit rule governing this case, the Fifth Circuit has held that the denial of an

appointment of counsel is an immediately appealable order under the collateral order doctrine. *Robbins*, 750 F.2d at 407. The court explained that a denial of appointment of counsel "conclusively determine[s]" whether a defendant must litigate "without the assistance of appointed counsel." *Id.* at 412. The denial also is collateral to the case, because "[t]he factors examined in reviewing an order denying appointment of counsel" are different from those governing the merits of a case. *Ibid.* And the court of appeals concluded that the denial of the appointment of counsel is effectively unreviewable because there is a "great risk" that a civil rights plaintiff denied counsel "may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case." *Ibid.*; *see also Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (explaining that "a layman unschooled in the law in an area as complicated as the civil rights field * * * likely has little hope of successfully prosecuting his case to a final resolution on the merits").

The Eighth Circuit also has had "little hesitation in concluding that" an order denying appointment of counsel is immediately appealable. The court of appeals explained that an order denying appointment "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and [would] be effectively unreviewable on appeal from a final judgment." *Slaughter*, 731 F.2d at 588 (quoting *Coopers &*

Lybrand, 437 U.S. at 468); *see also Hudak v. Curators of Univ. of Mo.*, 586 F.2d 105, 106 (8th Cir. 1978) ("We have held that denial of appointment of counsel is appealable under 28 U.S.C. § 1291 as a final collateral order on the basis that the harm it may cause can be irreparable on appeal of the final judgment."), cert. denied, 440 U.S. 985 (1979).

Like the Fifth and Eighth Circuits, the Federal Circuit has held "that denial of the request for appointment of counsel [in a civil case] is immediately reviewable on appeal." *Lariscey*, 861 F.2d at 1270. In so concluding, the Federal Circuit recognized the existence of "a split among the regional circuits" on the issue. *Id.* at 1269. The court explained that a district court's denial of the appointment of counsel conclusively determines an issue that is entirely distinct from the merits of the underlying case—i.e., that it is not "necessary to resolve any issues on the [case's] merits in order to consider the question of appointment of counsel." *Id.* at 1270. And the court of appeals explained that the appointment of counsel issue was effectively unreviewable because "it is far from clear that once the merits had been decided, the absence of counsel would so readily be held harmful." *Ibid.* The court reasoned that if the case appeared on appeal "to have been reasonably presented, the appellate court may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor." *Ibid.*

These courts of appeals, in conflict with the ruling below, continue to adhere to their precedent permitting immediate appellate review of an order denying the appointment of counsel. *See, e.g.*, *Sanchez v. Chapman*, No. 08-11082, 2009 WL 3731891, at *2 (5th Cir. Nov. 9, 2009); *Swackhamer v. Scott*, 276 Fed. App'x 544, 545 (8th Cir. 2008); *Medrano v. Thomas*, 99 Fed. App'x 521, 522 (5th Cir. 2004). And on a number of occasions, those courts have concluded that the denial by the district court of the appointment of counsel was in error. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane v. Astrue*, 279 Fed. App'x 421, 422 (8th Cir. 2008) (per curiam).

2. ***Nine courts of appeals have held there is no appellate jurisdiction to immediately review the denial of the appointment of counsel, although they disagree on the rationale***

On the other side of this rift in the courts of appeals, the Fourth Circuit below is joined by the First, Second, Third, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, all of which have held that the denial of appointment of counsel is not an immediately appealable order. *See Ficken v. Alvarez*, 146 F.3d 978, 981-982 (D.C. Cir. 1998); *Holt v. Ford*, 862 F.2d 850, 852-854 (11th Cir. 1989) (en banc); *Miller v. Simmons*, 814 F.2d 962, 965-967 (4th Cir.), cert. denied, 484 U.S. 903 (1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761-762 (6th Cir.) (en banc), cert. denied, 474 U.S. 1036 (1985); *Smith-Bey*

v. Petsock, 741 F.2d 22, 24-26 (3d Cir. 1984); *Appleby v. Meachum*, 696 F.2d 145, 146 (1st Cir. 1983); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981); *Miller v. Pleasure*, 425 F.2d 1205, 1206 (2d Cir.) (per curiam), cert. denied, 400 U.S. 880 (1970). While these courts agree as to the result, they are significantly divided as to the reasoning for it.

a. Several courts of appeals have held that an order denying the appointment of counsel, while conclusively determining a collateral issue in the proceeding, is nevertheless not an appealable order because it would be reviewable on final judgment. The Tenth Circuit, for example, has held that such an order is reviewable at the end of the case because it "can be fully remedied by a post-judgment reversal and a new trial." *Cotner*, 657 F.2d at 1392. The First and Seventh Circuits also have adopted this rationale in denying immediate appellate review of appointment of counsel orders. *See Appleby*, 696 F.2d at 146 (First Circuit); *Randle*, 664 F.2d at 1066 (Seventh Circuit).

b. In contrast, the Fourth, Sixth, and Eleventh Circuits have adopted a different basis for holding that the denial of the appointment of counsel is not an appealable collateral order. These courts have all ruled that such an order fails to satisfy *any* of the requirements under the collateral order doctrine.

When establishing the governing rule applicable to this case, the Fourth Circuit held that the denial of

the appointment of counsel is not a conclusive ruling because "the district court can reconsider, at a later time, in the exercise of its discretionary authority, the appointment of counsel as a viable option, if in fact such is determined to be necessary." *Miller*, 814 F.2d at 966. Moreover, the court of appeals reasoned that the issue was not collateral to the merits of the case because the "ultimate effect" of the denial of the appointment of counsel "cannot be fairly and adequately assessed until the substance of the entire case is known" and a plaintiff can subsequently show "that the absence of appointed counsel was so prejudicial that the denial amounted to a denial of fundamental fairness." *Ibid.* The court further concluded that the denial of the appointment of counsel is not effectively unreviewable in a final judgment because "[e]xperience teaches that a *pro se* litigant will raise on appeal each and every issue resulting from an unfavorable ruling" and, if prejudicial error is shown, the "judgment can be vacated and remedial measures can be ordered." *Id.* at 967.

Divided en banc rulings from the Sixth and Eleventh Circuits are in accord with the Fourth Circuit's reasoning. In both cases, those courts of appeals concluded that an order denying the appointment of counsel does not meet any of the requirements of the collateral order doctrine. *See Henry*, 763 F.2d at 761-762 (Sixth Circuit); *Holt*, 862 F.2d at 852 (Eleventh Circuit). Four judges in each of these circuits, however, dissented from their respective court's rulings.

In the Sixth Circuit, the dissent explained that the majority's reasoning was based upon an "unsupported conclusory hypothesis that dispositions of motions to appoint counsel are 'inherently tentative' since trial judges may reconsider their ruling as the *pro se* complainant develops the evidence during trial." *Henry*, 763 F.2d at 765 (Krupansky, J., dissenting). According to the dissent, the issue was collateral to the merits of the case because it involved only "a minimal and incidental inquiry by the Court which in no way enmeshes it in the underlying cause of action itself." *Id.* at 767. Finally, the dissent explained that the majority had unnecessarily "equate[d]" the requirement that the collateral order be effectively unreviewable with it being "jurisdictionall[ly] unreviewable." *Id.* at 768.

Likewise, the dissent for four judges in the Eleventh Circuit explained that the denial of a motion for the appointment of counsel was conclusive because the district court "*denied* the motion" and "did not indicate that its order was tentative." *Holt*, 862 F.2d at 856 (Vance, J., dissenting). And the issue was collateral to the merits of the case because "[s]uch rulings merely require courts to determine whether the underlying claim has *some* merit." *Id.* at 857. Finally, the dissent explained that the majority lost sight of the fact that the inquiry "is not whether a claim becomes jurisdictionally unreviewable, but whether it becomes *effectively* unreviewable." *Ibid.* The dissent explained that after a final judgment "where a district court has denied a civil rights

plaintiff appointed counsel, the record on appeal probably will not be sufficient to reveal what the plaintiff could have proved if counsel had been appointed." *Id.* at 858.

c. Finally, three other courts of appeals have each emphasized different bases for determining that there is no appellate jurisdiction to review a district court's order denying the appointment of counsel. The Second Circuit has held that such a "determination whether the district judge abused his discretion requires considerable exploration of the merits" of the case. *Pleasure*, 425 F.2d at 1206. A divided Third Circuit has held that the denial of the appointment of counsel is not immediately appealable because it required examination of "issues 'enmeshed' in the plaintiff's cause of action" and was reviewable at the end of the case. *Smith-Bey*, 741 F.2d at 24-26. And the D.C. Circuit, which ironically appointed amicus counsel to argue the appeal along with the pro se litigant, recognized this division in the circuits. In finding a lack of appellate jurisdiction for an immediate appeal, it reasoned that the denial of counsel does not conclusively determine the issue because the district court can always reconsider its prior ruling and did not "render impossible any review whatsoever." *Ficken*, 146 F.3d at 982 (quoting *Firestone*, 449 U.S. at 376).

3. The Ninth Circuit has held that its appellate jurisdiction depends upon the claim being raised

In conflict with every other circuit to consider the issue, the Ninth Circuit has staked out its own ground, holding that the appealability of a denial of appointment of counsel depends upon the claim being raised.

In *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981), the court of appeals held that "orders denying appointment of counsel in Title VII suits are [immediately] appealable under Section 1291." *Id.* at 1305. But the Ninth Circuit has held that the denial of appointment of counsel is not immediately appealable in a habeas proceeding, *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983), or in a proceeding brought under Section 1983, *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (concluding that such orders require a court to enmesh itself in the merits of the case). In explaining its divergent treatment of such cases, the court noted that in Title VII suits, unlike those brought under Section 1983, "Congress has made explicit findings that Title VII litigants are presumptively incapable of handling properly the complexities involved in Title VII cases." *Wilborn*, 789 F.2d at 1330 n.2.

B. Review Is Necessary Because The Question Whether Counsel Should Be Appointed Is A Crucial Threshhold Issue That, When Incorrectly Determined And Left Unreviewed, Adversely Affects All Subsequent Litigation Decisions

Although the division in the courts of appeals alone justifies this Court's review, certiorari should be granted because the question presented is exceptionally important. Whether a pro se party who cannot afford a lawyer, but is erroneously denied one, can seek immediate appellate relief could be case dispositive. Under the approach of the court below, and eight other courts of appeals, such a party must go through the entire district court proceeding without counsel, with only the hope that his unfamiliarity with law and procedure does not irreparably prejudice the merits of his case, such that any eventual review of the denial of counsel is effectively meaningless.

The importance of ensuring that a party entitled under the law to counsel receives one at the earliest opportunity should be beyond dispute. This Court has recognized that a pro se litigant is at a severe, and at many times almost insurmountable, disadvantage in civil litigation against a counseled adversary. *See Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries * * * ."). Counsel are needed to execute basic advocacy

functions: to delineate the issue, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. Pro se litigants normally cannot adequately perform any of these tasks. *See* Am. Bar Ass'n, *Report to the House of Delegates* 9 (2006) (noting that counsel is required to navigate the "inevitably adversarial and complex" nature of our judicial system), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf (last visited Mar. 19, 2010).

Indeed, the entire adversary process can be distorted by the failure to appoint counsel in the proper case. The pro se litigant may accidentally or deliberately drop a claim, fail to prosecute the case from ignorance or inability, inadvertently disclose previously privileged material, settle on disadvantageous terms, or fail on a technicality to perfect an appeal. *See Bradshaw*, 662 F.2d at 1310-1311 (detailing harms that a pro se litigant may suffer without immediate review of an order denying appointment of counsel); 15B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3914.21, at 106-107 & 112 n.47 (2d ed. 1992) (same). In short, "it is not realistic to expect that effective relief can be given on appeal from the final judgment." Wright & Miller, *supra*, at 106. The decision whether to appoint counsel can thus be viewed as virtually outcome determinative in many cases: empirical studies show that legal representation is an important factor in whether a party wins a case. *See*,

e.g., Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 553-554 (1992).

This Court has granted interlocutory review for a myriad of important rights like those implicated in this case. *See, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (order denying State's claim to Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 659 (1977) (order rejecting double jeopardy claim); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (order denying motion to reduce bail); *Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (order denying in forma pauperis status). Whether a pro se litigant is entitled to immediate appellate review of the denial of counsel is a similarly significant issue, which at the very least is too important to be subject to the divergent treatment in the courts of appeals that now exists.

C. This Case Presents An Ideal Opportunity To Address An Issue That Typically Evades Review

Although the question presented has long divided the circuits, the question is neither stale nor often denied by this Court. This Court has been afforded few opportunities to address the question presented,

and this case provides a unique opportunity to address a circuit conflict that involves every federal court of appeals.

1. There are obvious reasons why the question presented often evades this Court's review. On the one hand, cases arising in those jurisdictions in which immediate appeals from orders denying counsel are permitted will rarely, if ever, reach this Court on the appellate jurisdiction issue. Pro se litigants in those cases are able to appeal denials, and thus have no reason to ask for this Court's intervention on that issue. And the only injury suffered by opposing parties in those cases is the interlocutory appeal on whether a pro se litigant is entitled to representation, which is an issue on which the opposing party is unlikely to seek this Court's review.

Moreover, cases arising in those jurisdictions that do not permit immediate appeals from these orders often will likewise evade this Court's review. The party aggrieved in those cases is the pro se litigant, who is unlikely to realize that the court of appeals' dismissal for lack of appellate jurisdiction is itself reviewable by this Court.

This petition is one of those few instances in which a case that squarely presents this question is before the Court. The Fourth Circuit decided the precise question presented in this petition, and a determination by this Court about whether orders denying appointment of counsel are immediately appealable will be dispositive of that issue in this case. And,

although not critical to the jurisdictional question before the Court, the underlying issues in this case—which involve the intersection between civil rights suits and federal habeas corpus—are precisely the type that would benefit from the appointment of counsel. Indeed, the Fourth Circuit thought as much when it appointed appellate counsel to review, and ultimately reverse, the district court's prior sua sponte dismissal of the case.

2. In 1987, members of this Court recognized "[t]he continued split amongst the Circuits on this issue" and thought it warranted this Court's review. *Miller v. Simmons*, 484 U.S. 903, 904 (1987) (White, J., dissenting from denial of cert., joined by Blackmun, J.). Five years later, the leading treatise on federal practice and procedure recognized that the circuits were split over this issue and observed that this Court should intervene once sufficient time had passed to gauge whether these types of interlocutory appeals burdened the judiciary. Wright & Miller, *supra*, at 114.

In the intervening span of nearly two decades, no evidence has developed that permitting these types of interlocutory appeals would result in a deluge of appeals. And decisions from those courts of appeals that permit immediate appeals demonstrate that there are instances where district courts err in refusing to appoint counsel. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane*, 279 Fed. App'x at 422.

The time is now right for this Court to review this important issue.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 22, 2010

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7318

LEE O. WILSON, JR.,

Plaintiff-Appellant,

v.

GENE JOHNSON, Director of Department of Corrections; DORIS EWING, Court and Legal Supervisor; EDWARD MEEKS, Superintendent Cold Springs Work Center,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00165-LMB-JFA)

Submitted: November 17, 2009
Decided: November 24, 2009

Before WILKINSON, MICHAEL, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Lee O. Wilson, Jr., Appellant Pro Se. John Michael Parsons, Assistant Attorney General, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lee O. Wilson, Jr., seeks to appeal the district court's order denying his motion for appointment of counsel. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2006), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2006); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The order Wilson seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Lee O. Wilson,	)	
Plaintiff,	)	
	)	**1:07cv165 (LMB/JFA)**
v.	)	
	)	**(Filed Jun. 29, 2009)**
Gene Johnson, *et al.*,	)	
Defendants.	)	

ORDER

Lee O. Wilson, a Virginia inmate proceeding *pro se*, filed a civil rights action, pursuant to 42 U.S.C. § 1983, seeking monetary damages for an allegedly unconstitutional former term of imprisonment. On February 27, 2007, the action was dismissed without prejudice pursuant to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). On July 25, 2008, that decision was reversed and remanded for further proceedings. *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008). Pursuant to the remand, defendants Gene Johnson, Doris Ewing, and Edward Meeks have returned executed waivers of service, and on June 23, 2009, the defendants jointly filed an answer to the complaint and moved for summary judgment. Now before the Court are two motions by plaintiff to appoint counsel.

A court may request an attorney to represent an indigent plaintiff proceeding *in forma pauperis*.

28 U.S.C. § 1915(e)(1). The Fourth Circuit, however, has limited the appointment of counsel to cases where "exceptional circumstances" exist, such as cases with particularly complex factual and legal issues or with a litigant who is unable to represent himself adequately. *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984). It is unnecessary at this time to appoint counsel for plaintiff. Plaintiff has made no showing that "exceptional circumstances" exist in this case which would warrant appointment of counsel. In addition, to date, plaintiff has ably filed his pleadings and replied to the various orders, as well as demonstrated comprehension of the procedures and laws of this Court and the Fourth Circuit Court of Appeals. Thus, plaintiff's Motions to Appoint Counsel must be denied.[1]

Accordingly, it is hereby

ORDERED that plaintiff's Motion to be Appointed Counsel (Docket # 24) and Motion to Appoint Counsel (Docket # 30) be and are DENIED.

The Clerk is directed to send a copy of this Order to plaintiff and to counsel for the defendants.

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[1] Plaintiff states that Professor J. E. Coleman, plaintiff's legal advisor in the appellate proceeding, told plaintiff that he "is supposed to have been appointed a mouthpiece," but for the reasons stated herein, no showing sufficient to warrant that action has been demonstrated.

Entered this 29th day of June 2009.

Alexandria, Virginia /s/ LMB
Leonie M. Brinkema
United States District Judge

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LEE O. WILSON, JR.,

Plaintiff-Appellant,

v.

GENE JOHNSON, Director of Department of Corrections; DORIS EWING, Court and Legal Supervisor; EDWARD MEEKS, Superintendent Cold Springs Work Center,

Defendants-Appellees.

No. 07-6347

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00165-LMB)

Argued: March 18, 2008

Decided: July 25, 2008

Before MICHAEL and GREGORY, Circuit Judges, and David R. HANSEN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed and remanded by published opinion, Judge Gregory wrote the opinion, in which Judge Michael joined. Senior Judge Hansen wrote a dissenting opinion.

OPINION

GREGORY, Circuit Judge:

The Appellant, Lee O. Wilson, Jr., ("Wilson") appeals the district court's decision to dismiss his 42 U.S.C. § 1983[1] action against the Virginia Department of Corrections. Wilson claims that he is entitled to monetary damages for unconstitutional imprisonment because Virginia improperly extended the length of his prison sentence. The district court, citing to the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), dismissed Wilson's wrongful incarceration claim *sua sponte* stating that a "§ 1983 damages claim for unconstitutional imprisonment is not appropriate unless and until plaintiff's conviction or sentence 'has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized

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[1] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.'" (J.A. 14.) This mandate is referred to as the "favorable termination" requirement.

Wilson contends that his § 1983 action is proper because success on that claim will not impugn his underlying conviction or sentence. Assuming, as we must, that Wilson's well-pleaded allegations are true, we agree that his claim is viable and as such, the district court's decision is reversed and remanded.

I.

Wilson was arrested on March 24, 2005, for grand larceny of a motor vehicle. On July 26, 2005, he pled guilty to the lesser charge of being an accessory after the fact. Consistent with Wilson's plea agreement, the Virginia state court sentenced him to twelve months imprisonment, six months of which was suspended due to time served. According to the Virginia Department of Corrections' ("VDOC") Uniform Commitment Report, Wilson's release date was April 21, 2006. (J.A. 6.) However, on March 15, 2006, the VDOC changed Wilson's release date to July 17, 2006. Wilson filed grievances with the prison administration disputing his additional imprisonment. The VDOC did not initiate any formal administrative proceedings to resolve Wilson's complaint. After

Wilson was released from prison,[2] he sued, seeking monetary damages of $105,000 for wrongful imprisonment. The district court dismissed Wilson's claim without prejudice, holding that *Heck*'s favorable termination requirement barred his § 1983 claim and stating that Wilson "may resubmit his claims to this Court in a [habeas petition]." (J.A. 15.) Wilson appeals.

II.

The VDOC contends that Wilson's § 1983 claim is not cognizable because: (1) Wilson failed to satisfy *Heck*'s favorable termination requirement prior to filing his claim, and (2) even if *Heck* did not bar Wilson's claim, because the VDOC properly calculated his sentence, Wilson's claim is moot.[3] Wilson argues

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[2] After his release, Wilson was imprisoned again on an unrelated charge. During this imprisonment, Wilson filed this § 1983 claim along with a habeas claim. In the habeas petition, Wilson argued, *inter alia*, that the VDOC improperly extended his accessory after the fact sentence. The Virginia Circuit Court dismissed Wilson's habeas petition, finding that the VDOC properly calculated Wilson's sentence. The Virginia Supreme Court affirmed the trial court's decision. The VDOC argued in a motion to stay prior to oral argument, and in a motion to dismiss after oral argument, that the Virginia Circuit Court's decision resolved the underlying factual issue in this case, thus mooting Wilson's claim. Because the issue before us is limited to the legal question of whether Wilson's § 1983 claim is cognizable, we leave the issue of whether the Virginia Circuit Court's decision moots Wilson's claim for the district court to determine on remand. As such, the VDOC's motion to dismiss is denied.

[3] *See* note 2, *supra*.

that a § 1983 action is the proper vehicle to bring his wrongful imprisonment claim because a habeas action would have been inappropriate as he does not seek release from custody. Thus, whether Wilson's § 1983 claim for wrongful imprisonment, filed after his sentence expired, is cognizable, is the sole issue before this Court. We review the district court's decision to dismiss Wilson's claim due to lack of subject matter jurisdiction, a question of law, de novo, *see e.g., Church v. Attorney General of Com. of Va.*, 125 F.3d 210, 215 n. 5 (4th Cir. 1997), taking all of his allegations "in the light most favorable to [him]." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal quotation marks and citation omitted).

Although the convergence of habeas and § 1983 actions has been addressed by the Supreme Court on several occasions, as the VDOC admits, it has sent "mixed signals" as to when an inmate or former inmate can pursue a § 1983 claim. (Appellee's Br. 4.) In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), a group of state prisoners filed a § 1983 action alleging that the New York State Department of Correctional Services' denial of good-time credits violated their constitutional right to due process. The prisoners sought an injunction to force the prison to restore the credits, a remedy which would have reduced the prisoners' sentences. Despite the "literal applicability" of § 1983, the Supreme Court affirmed the district court's dismissal of the claim because the prisoners' "challenge is just as close to the core of

habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.* at 489. Because the plaintiffs "sought no [monetary] damages, but only equitable relief-restoration of their good-time credits," *id.* at 494, the Supreme Court expressly limited its holding to the equitable relief sought by the prisoners.

Subsequently, in *Wolff v. McDonnell,* 418 U.S. 539 (1974), an inmate filed a § 1983 class action on behalf of himself and other inmates, alleging *inter alia,* that the disciplinary proceedings at the Nebraska Penal and Correctional Complex violated their due process rights. Like the plaintiffs in *Preiser,* the prisoners complained that the prison had improperly denied them good-time credits and sought injunctive relief. The *Wolff* inmates, however, also sought damages. In holding that *Preiser* precluded injunctive relief – i.e., the restoration of good-time credits, the Supreme Court confirmed the propriety of the plaintiffs' § 1983 claim:

> habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.

Id. at 554. Thus, the Supreme Court concluded that the district court erred by not determining "the validity of the procedures employed for imposing sanctions, including loss of good . . . [because] a declaratory judgment as a predicate to a damages award would not be barred by *Preiser*." *Id.* at 554-55.

Two decades after *Wolff*, the Supreme Court, in *Heck*, considered a prisoner's § 1983 claim seeking monetary damages from the state because (1) state officers participated in an "unlawful, unreasonable, and arbitrary investigation leading to [his] arrest," (2) state officers "knowingly destroyed" exculpatory evidence, and (3) "an illegal and unlawful voice identification procedure" was relied upon at trial. *Heck*, 512 U.S. at 479 (internal quotation marks omitted). Recognizing that *Preiser* provided an "unreliable, if not an unintelligible, guide," *id.* at 482, as to whether a § 1983 claim for monetary damages is proper when it fails to challenge the "lawfulness of conviction or confinement," *id.* at 483, and concluding that *Wolff* "recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits)," *id.* at 482-483, the Court analyzed the issue as a matter of first impression. After reiterating that § 1983 claims, unlike petitions for habeas corpus, do not require administrative exhaustion, the Court held that when a plaintiff's claims challenge "the lawfulness of conviction or confinement," *id.* at 483, they are simply not "cognizable as § 1983 claims" *id.*, because:

> [w]e think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that **necessarily require** the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

Id. at 486 (emphasis added). *Heck's* holding precludes a prisoner from a collateral attack that may result in two inconsistent results – for example, a valid criminal conviction and a valid civil judgment under § 1983 for monetary damages due to unconstitutional conviction or imprisonment.[4] Although not essential to its holding, the Supreme Court extended its analysis a step further by concluding that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 489 n. 10.

Justice Souter's concurrence in *Heck*, joined by three Justices, recognized that the majority opinion could be interpreted to "risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes," *id.* at 500, thus preventing them from accessing a federal forum.

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[4] An additional reason for the rule is to preclude undue federal interference with states' administration of justice.

> If these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not in custody cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Id. (Souter, J., concurring) (internal quotation marks omitted). Absent a statutory edict to the contrary or a restriction within the common law, the reach of § 1983 should not be compromised. Indeed, the Court has given "full effect [to the language of § 1983 by] recognizing that § 1983 provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Id.* at 502 (internal quotation marks and citations omitted). Thus, we "[sh]ould not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983." *Id.* at 503.

Heck and its predecessors limited our inquiry to whether a prisoner's § 1983 action, "even if successful," *id.* at 487, would compromise the validity of his underlying sentence. Four years later, however, five members of the Supreme Court found *Heck*'s "favorable termination" requirement inapplicable to a released inmate's § 1983 claim, since this was the only avenue by which he could access a federal forum. *See Spencer v. Kemna*, 523 U.S. 1 (1998). In *Spencer*, the defendant filed a federal habeas claim averring that his due process rights were violated because his parole was improperly revoked. The district court dismissed the claim as moot because the defendant was released from prison before the district court decided his habeas claim. The majority opinion, written by Justice Scalia, who also authored the Court's opinion in *Heck*, affirmed the district court's decision.

Justice Souter, joined by three other colleagues (O'Connor, Ginsburg,[5] and Breyer, JJ.), concurred with the reasoning of the majority opinion, but more importantly, articulated an additional reason for why the correct result was reached:

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[5] Justice Ginsburg, in addition to joining Justice Souter's concurrence, wrote a separate concurrence in which she stated, "I have come to agree with Justice SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's ('broad reach.')" *Id.* at 21-22 (emphasis in original).

> Now, as then, we are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.
>
> The better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.

Id. at 20-21. Justice Stevens dissented, agreeing with the four concurring judges that "[g]iven the Court's holding that [Spencer] does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25 n. 8 (emphasis in original).

Both parties readily recognize that the circuits are split on this issue. Four circuits regard the five justice plurality in *Spencer* as dicta, and continue to interpret *Heck* as barring individuals from filing

virtually all § 1983 claims unless the favorable termination requirement is met.[6] On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a habeas action.[7]

As evidenced by the circuit split, the Supreme Court has yet to conclusively decide if a former inmate can file a § 1983 claim when his habeas avenue to federal court has been foreclosed. *See Muhammad v. Close*, 540 U.S. 749, 752 n. 2 (4th Cir. 2004) (recognizing, without deciding, that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.") Even the four judge concurrence in *Spencer* admitted that *Heck*'s

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[6] *See e.g., Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); and *Fuchs v. Mercer County*, 260 Fed. Appx. 472, 474 (3d Cir. 2008) but cf. *Mendoza v. Meisel*, 270 Fed. Appx. 105, 107 (3d Cir. 2008) (holding that "*Heck* does not bar a § 1983 claim where the plaintiff is unable to challenge his conditions of confinement through a petition for federal habeas corpus.").

[7] *See e.g., Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Nonette v. Small*, 316 F.3d 872, 874 (9th Cir. 2002); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003); and *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007) ("We are persuaded by the logic of those circuits that have held that *Heck's* favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights.").

"favorable-termination requirement [can be interpreted as] an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed." *Spencer*, 523 U.S. at 19.

Because Wilson's § 1983 claim seeks damages for past confinement, he does not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck* or *Spencer*. Thus, while Supreme Court dicta in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma, we are left with no directly applicable precedent upon which to rely. We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim was barred. Indeed, the reach and intent of the habeas remedy would not be circumscribed by Wilson's § 1983 claim since he filed it after the expiration of his sentence.[5] Additionally, the sweeping

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[5] While Wilson concedes that filing a petition for habeas corpus was theoretically possible, he argues that complying with habeas' administrative exhaustion requirement during the additional confinement was impossible. The plaintiffs in *Preiser* and *Wolff* admittedly could have filed habeas claims. The fact that a prisoner could have filed a habeas [sic] is an issue in which courts have taken a keen interest. For example, in *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007), the Sixth Circuit held that "a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded as a matter of law from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained

(Continued on following page)

breadth, "high purposes," and "unique[ness]" of § 1983 would be compromised in an unprincipled manner if it could not be applied here. *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (overruled on other grounds). If a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim, § 1983's purpose of providing litigants with "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nations," *id.* at 271-272 (internal quotation marks and citation omitted), would be severely imperiled. Barring Wilson's claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment. Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right – freedom – should be left without access to a federal court.

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habeas review while still in prison but failed to do so." *Id.* at 601 (internal quotation marks and citation omitted). In *Powers*, the defendant only spent one day in jail, thus precluding him from filing a habeas petition as a practical matter. In *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999), the Second Circuit held that *Heck* did not bar an individual's § 1983 claim alleging selective prosecution because his criminal sentence only involved paying a monetary fine.

III.

For the foregoing reasons, we reverse the judgment of the district court and remand it for further proceedings consistent with this opinion.

REVERSED AND REMANDED

HANSEN, Senior Circuit Judge, dissenting:

The *Heck*[1] favorable termination requirement is more than *dicta* that we, as an inferior court, can choose to ignore. Despite the views of the then-five sitting justices (now reduced to four on the current Court) expressed in *Spencer*,[2] the Supreme Court has not made any exceptions to the favorable termination requirement, and we are bound to enforce the requirement where it applies. Because Wilson's § 1983 claim "necessarily require[s] [Wilson] to prove the unlawfulness of his . . . confinement," *Heck*, 512 U.S. at 486, I would affirm the district court's dismissal. I therefore respectfully dissent.

This court's opinion properly articulates *Heck*'s holding that claims challenging the lawfulness of a

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[1] *Heck v. Humphrey*, 512 U.S. 477 (1994).

[2] *Spencer v. Kemna*, 523 U.S. 1 (1998). Notably, this court's opinion elevates these views to that of a "plurality," (*supra* at 9), even though the Supreme Court itself has recognized them for what they are – the views of five justices in *Spencer* articulated in concurrences and a dissent, *see Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004).

defendant's conviction or his confinement are simply not cognizable under § 1983, and that the holding applies to "'§ 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement.'" (*See supra* at 6, quoting *Heck*, 512 U.S. at 486 (emphasis omitted)). As articulated by the Supreme Court, that holding is unqualified. *See*, 512 U.S. 477 (1994). *Heck*, 512 U.S. at 486-87 ("We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]."') (footnote omitted). Rather than apply *Heck*'s holding to Wilson's § 1983 claim, this court's opinion then goes into a discussion of the views of five of the then-sitting justices espoused in *Spencer* about the effect of *Heck* on claimants who lack a justiciable habeas claim. *Spencer* involved the issue of whether a habeas claim became moot when the claimant was released from prison during the pendency of the habeas claim. *Spencer*, 523 U.S. at 3. Spencer had not filed a § 1983 claim. The only relevance § 1983 had to the *Spencer* case was Spencer's argument that his habeas claim should not be moot because *Heck* would preclude a later § 1983 claim, leaving him with no recourse. The majority opinion, which was joined in full by the concurring opinions, rejected that argument, calling it "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* at 17. The

discussion in Justice Souter's concurrence is nothing more than an expression of his views about whether the habeas claimant ought to be able to bring a § 1983 claim after his habeas claim became moot, an issue not then before the Court.

Our panel's opinion in this case then determines, without elaboration, that this case is not directly controlled by *Heck* "[b]ecause Wilson's claim seeks damages for past confinement." (*See supra* at 9.) That factual distinction notwithstanding, *Heck*'s holding, as well as its reasoning, clearly covers Wilson's § 1983 claim. In rejecting Justice Souter's suggestion that a § 1983 claim might lie where the claimant has no available habeas remedy, Justice Scalia, writing for the majority in *Heck*, reinforced the purpose behind its holding by stating that "the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10. In my view, although *Heck* did not involve a claim based on past confinement, this statement is part of the core holding of *Heck* by which we are bound. *See Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) ("Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck* [referring to the statement in footnote 10], however, we decline to depart from that rule."), *cert. denied*, 128 S. Ct. 1714 (2008); *Figueroa v. Rivera*, 147 F.3d 77, 81 & n.3 (1st Cir. 1998) (describing *Heck*'s "core holding" as

requiring the "annulment of the underlying conviction" before a § 1983 claim could be brought in a case where habeas was unavailable due to the inmate's death). The importance of avoiding inconsistent results between a criminal conviction and sentence on the one hand and a civil constitutional tort action on the other is not lessened just because the defendant/claimant is no longer incarcerated.

The Supreme Court has reinforced the continuing validity of the *Heck* favorable termination requirement since *Spencer*. In explaining the intersection between habeas claims and § 1983 claims, the Supreme Court stated that "[s]ome cases are hybrids, with a prisoner seeking relief unavailable in habeas, notably damages, but on allegations that not only support a claim for recompense, but imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." *Muhammad*, 540 U.S. at 750-51. In those hybrid situations, a defendant must still establish favorable termination of his underlying conviction or sentence before being allowed to bring a § 1983 claim seeking damages for the alleged deprivation of his constitutional rights. *Id.* at 751. This case fits squarely within the favorable termination requirement as expressly articulated by the Supreme Court thus far.

Even if the *views* of the members of the Supreme Court have changed, we are bound to follow the holdings of the Supreme Court until the Court *holds* differently. *See Agostini v. Felton*, 521 U.S. 203, 237

(1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal marks omitted)); *Mackall v. Angelone*, 131 F.3d 442, 445-49 (4th Cir. 1997) (en banc) (applying the rule from *Agostini* and following *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), even though the case at hand was factually distinguishable from *Finley* and the Supreme Court had noted, but not ruled on, the same factual distinction in *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)), *cert. denied*, 522 U.S. 1100 (1998). That Justice Ginsburg changed her mind between *Heck* and *Spencer* does not change the fact that we, as an inferior court, must continue to follow the holdings of the Supreme Court, not the views as espoused by the varying justices on issues not before the Court. *See United States v. Chase*, 466 F.3d 310, 315-16 (4th Cir. 2006) ("[Although] the overruling of *Almendarez-Torres* may be imminent, *see Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ('*Almendarez Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.'), . . . until such overruling occurs, we must follow the decision when it controls." (citing *Agostini*)). We hold no charter to carve exceptions out of Supreme Court stone even if the winds of changing views have eroded

it. Judicial restraint, as well as respect for precedent and our place within the hierarchy of the federal judiciary, counsel that we must continue to apply the *Heck* favorable termination requirement where applicable, and without exception, until the Supreme Court tells us otherwise.

I respectfully dissent.

No. 09-1143

Supreme Court, U.S.
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In The

Supreme Court of the United States

LEE O. WILSON, JR.,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order initially denying the appointment of counsel in a civil case falls within the rare class of immediately appealable interlocutory orders.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II on behalf of Gene M. Johnson, Director of the Virginia Department of Corrections, submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

More than twenty years ago, a few circuits diverged from the remainder of the circuits on the issue of whether an order denying the appointment of counsel to a *pro se* litigant is immediately appealable. Three circuits hold that such an order is immediately appealable whereas the other circuits reject that view. Although such a split ordinarily might warrant this Court's review, several recent decisions from this Court make clear that this minority view is incorrect. None of these circuits have been asked to reconsider their holdings in light of this Court's recent cases. Given the likelihood that the split will resolve itself, there is no need for this Court to address the issue. Moreover, this case constitutes a poor vehicle to address the issue.

[1] On May 11, 2010, this Court extended the time for such filing to and including July 6, 2010.

STATEMENT OF THE CASE

1. Lee O. Wilson, Jr., while incarcerated in the Virginia Department of Corrections for a number of crimes, filed a complaint under 42 U.S.C. § 1983 alleging that the Virginia Department of Corrections had improperly detained him beyond the end of his sentence. Pet. App. 7a-8a. At the same time, Wilson sought habeas corpus relief in state court on the same basis. Pet. App. 9a n.2. Before the district court ruled on Wilson's § 1983 claim, the state circuit court held that the Virginia Department of Corrections correctly calculated Wilson's sentence and dismissed the petition. Pet. App. 9a n.2.

While his § 1983 case was still pending, Wilson was released from prison and then promptly re-incarcerated for a different crime. Pet. App. 9a. The district court, citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), dismissed the complaint *sua sponte*, without prejudice, on the basis that the petitioner must seek habeas relief rather than a civil action under § 1983. Pet. App. 7a.

Wilson appealed that determination to the United States Court of Appeals for the Fourth Circuit. A divided panel of that court reversed, holding *Heck* inapplicable because Wilson was seeking monetary damages for past incarceration, not release from present confinement. Pet. App. 18a. *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008).

2. Back in the district court, Wilson asked for a lawyer to be appointed. Pet. App. 3a. The district

court observed that while it may appoint counsel for *pro se* litigants under 28 U.S.C. § 1915(e)(1), the circumstances under which such an appointment is proper are limited. Under Fourth Circuit precedent, counsel may be appointed only if "exceptional circumstances" exist, such as when a case presents "particularly complex factual and legal issues" or when "a litigant . . . is unable to represent himself adequately." Pet. App. 4a (citing *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984)). The district court held that it was "unnecessary *at this time* to appoint counsel for plaintiff." Pet. App. 4a. The court reasoned that, no exceptional circumstances were present and, moreover, "to date, plaintiff has ably filed his pleadings and replied to the various orders as well as demonstrated comprehension of the procedures and laws of this Court and the Fourth Circuit Court of Appeals." Pet App. 4a. Wilson immediately appealed that order to the Fourth Circuit. That court dismissed the appeal, reasoning that it had no jurisdiction to entertain an appeal from such an interlocutory or collateral order. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, although there is a conflict among the Circuits on the question of whether an interlocutory appeal is permitted from an order refusing to appoint counsel, this split is simply an historical artifact that will likely resolve itself with the passage of time.

Moreover, this petition presents a poor vehicle for resolving the issue.

I. RECENT STATUTORY AND JURISPRUDENTIAL DEVELOPMENTS MAKE IT LIKELY THAT THE MINORITY CIRCUITS WILL REVISIT EARLIER HOLDINGS DECIDED BEFORE THESE CHANGES.

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). This longstanding policy is embodied in 28 U.S.C. § 1291, which limits the jurisdiction of the courts of appeals to appeals from "final decisions of the district courts." This Court has long given this statute a "practical rather than a technical construction," *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Over time, through case adjudication, this Court developed a body of law specifying which types of orders fall within the "narrow" exception to the requirement of finality and which do not.

In 1990, Congress altered this dynamic by amending the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, authorizing this Court to promulgate rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 2072(c). The Court recognized the importance of this development in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), and again in *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (2009). The Court

observed that the rulemaking procedure Congress established for determining which orders are appealable collateral orders "is not expansion by court decision, but by rulemaking under § 2072 . . . Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Swint*, 514 U.S. at 48. *See also Mohawk*, 130 S. Ct. at 609.

The petitioner correctly observes that three circuits have diverged from the strong majority of circuits that do not hear interlocutory appeals from orders denying the appointment of counsel.[2] All three decisions date from the same period some 20 or 25 years ago: *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984).[3] Each of these decisions was made

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[2] A strong majority of the circuits have concluded that an order declining to appoint counsel is not immediately appealable. *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983) (*per curiam*); *Miller v. Pleasure*, 425 F.2d 1205 (2nd Cir. 1970) (*per curiam*); *Smith-Bey v. Petsock*, 741 F.2d 22 (3rd Cir. 1984); *Miller v. Simmons*, 814 F.2d 962 (4th Cir. 1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066-67 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981); *Holt v. Ford*, 862 F.2d 850, 853-54 (11th Cir. 1989); *Ficken v. Alvarez*, 146 F.3d 978 (D.C. Cir. 1998).

[3] The Ninth Circuit, in a fact-specific and divided panel decision also held that the appointment of counsel in a Title VII

(Continued on following page)

before the amendments to the Rules Enabling Act and this Court's decisions in *Swint* and *Mohawk*. When these courts are again presented with the issue, it is difficult to see how, in light of *Swint* and *Mohawk*, these circuits could resist revising their holdings. Thus, there is no need for this Court to intervene.

In addition, all three decisions are premised upon the notion that an order refusing to appoint counsel is effectively unreviewable on appeal because "the appellate court may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor." *Lariscey*, 861 F.2d at 1270, or because the *pro se* litigant will be prejudiced throughout the trial. *See Slaughter*, 731 F.2d at 589; *Robbins*, 750 F.2d at 413.

After these decisions, in *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863 (1994), this Court swept aside both of these rationales. This Court noted that

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case was immediately appealable. *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981) (Reinhardt, J., writing for the court). The Ninth Circuit has since refused to extend the holding in *Bradshaw*, essentially limiting it to Title VII cases. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (refusing to extend the collateral order doctrine to plaintiffs in § 1983 cases, and limiting *Bradshaw* to the Title VII context); *Weygandt v. Look*, 718 F.2d 952 (9th Cir. 1983) (refusal of district court to appoint counsel in habeas cases not immediately appealable).

> the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history . . . But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third *Cohen* requirement [that an order be effectively unreviewable on appeal from a final judgment].

Id. at 872.

Applying this logic to the present context, an order denying the appointment of counsel is not "effectively unreviewable." The D.C. Circuit expressly relied on *Digital Equipment* to conclude that orders denying the appointment of counsel are not "effectively unreviewable." *Ficken*, 146 F.3d at 981-82. *Digital Equipment* fatally undermines the holding of the Fifth, Eighth and Federal Circuits that a refusal to appoint counsel is effectively unreviewable.

These two developments—the authority Congress conferred on this Court to rely on the rulemaking power rather than litigation to determine which collateral orders are immediately appealable, and this Court's clarification of what constitutes an

"effectively unreviewable" order—renders the minority view decisions of the Eighth, Fifth and Federal Circuits untenable. Lower courts must, of course, consider this Court's jurisprudence in assessing the ongoing validity of their own caselaw. There is no need for this Court to intervene to resolve a split that should resolve itself.[4]

In fact, that is precisely what happened in two circuits. The Seventh and Third Circuits have, in light of subsequent decisions from this Court, overruled earlier decisions permitting an interlocutory appeal. *See Petsock*, 741 F.2d at 26 (overruling *Ray v. Robinson*, 640 F.2d 474 (3rd Cir. 1981) on the ground that it had been "effectively overruled by the Supreme Court"); *Randle*, 664 F.2d at 1066-67 (overruling *Jones v. WYFR Radio/RKO General*, 626 F.2d 576 (7th Cir. 1980) as incompatible with a later decision from this Court).

Finally, courts adhering to the majority view that such orders are not immediately appealable will not hesitate to order a new trial or to remand the case when a district court has abused its discretion in

[4] To be sure, two of these circuits have more recently adjudicated cases involving interlocutory appeals of orders refusing the appointment of counsel. *Sanchez v. Chapman*, No. 08-11082, 2009 WL 3731891 (5th Cir. Nov. 9, 2009); *Swackhamer v. Scott*, 276 Fed. Appx. 544 (8th Cir. 2008); *Medrano v. Thomas*, 99 Fed. Appx. 521 (5th Cir. 2004); *Lane v. Astrue*, 279 Fed. Appx. 421 (8th Cir. 2008). It does not appear that in any of those cases the government asked the court to address the ongoing viability of precedent in light of this Court's more recent caselaw.

refusing to appoint counsel. *See Hodge v. Police Officers*, 802 F.2d 58, 62 (2nd Cir. 1986) (finding that district court abused its discretion in refusing to appoint counsel and ordering a hearing, with counsel, to determine whether the absence of counsel prejudiced the petitioner); *Whisenant*, 739 F.2d at 163-64 (ordering a new trial for *pro se* litigant who should have been appointed counsel). Given the broad discretion vested in trial courts in determining whether counsel should be appointed, such reversals will, of course, be rare.[5] Nevertheless, the clear availability of relief, combined with the broad discretion afforded to trial courts in deciding whether counsel should be appointed, militate in favor of allowing the circuits that adhere to the minority view the opportunity to reconsider.

II. THE FACTS OF THIS CASE MAKE IT A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The district court made it plain that it was declining to appoint counsel for the petitioner "at this time." Pet. App. 4a. The district court certainly did not foreclose the possibility that counsel might later be appointed. Moreover, in parallel state litigation, a circuit court in Virginia conclusively resolved the

[5] Courts employ a deferential abuse of discretion standard in reviewing orders declining to appoint counsel. *See, e.g., Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1980) *(per curiam)*; *Whisenant*, 739 F.2d at 163.

merits of the petitioner's underlying claim that he was incarcerated beyond his release date. Pet. App. 9a n.2. These specific circumstances make this case a poor vehicle to resolve the question presented. A dispute that might resolve itself at some future stage of the litigation, thus making the case moot, combined with a garden-variety attempt to relitigate an issue previously determined against a litigant, is hardly the sort of case that ordinarily receives this Court's attention.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

A. The Conflict Among Every Circuit Will Not Resolve Itself Absent This Court's Intervention

1. Respondents' so-called "recent" legal developments will not resolve the circuit split

Respondents agree that there is a deep split among all thirteen courts of appeals regarding whether the denial of appointment of counsel in a civil case is immediately appealable under the collateral order doctrine. Respondents also do not contend that any of the lower courts has questioned prior holdings or signaled that it may reverse course to resolve the split. It is thus not surprising that respondents concede that this "split [of authority] ordinarily might warrant this Court's review." Br. in Opp. 1.

Respondents' primary argument in opposition to certiorari is that this longstanding circuit split will simply resolve itself with the passage of yet more time. Br. in Opp. 3. They assert that "several recent decisions from this Court" will, in due time, cause the Fifth, Eighth, and Federal Circuits to reevaluate and reverse their holdings. Br. in Opp. 1.

The purportedly recent decisions on which respondents rely, however, are far from recent developments. Two of those cases—*Swint v. Chambers County Commission*, 514 U.S. 35 (1995), and *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863

(1994)—were decided 15 and 16 years ago, respectively. The third case, *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), did not modify the Court's collateral order jurisprudence in *Swint* and *Digital Equipment*, but rather simply reiterated it. Respondents also rely on a purportedly recent statutory change—an amendment to the Rules Enabling Act, 28 U.S.C. § 2071 et seq. Br. in Opp. 4. But that amendment occurred 20 years ago.

The courts that permit the immediate appeal of these orders have issued numerous decisions since these "recent" developments, yet no court has reconsidered its position in light of the authorities cited by respondents.[1] Indeed, during the intervening years, the split in authority has persisted and, in fact, deepened. If *Swint* and *Digital Equipment* were going to resolve the circuit split, it would have occurred long ago. The conflict among the circuits thus is not a "historical artifact," Br. in Opp. 3, but

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[1] The courts in *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984), and *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981), did not reconsider their holdings in light of the Rules Enabling Act amendment, *Swint*, or *Digital Equipment*, as respondents suggest. Br. in Opp. 8. Indeed, *Smith-Bey* and *Randle* were decided well before the Rules Enabling Act was amended in 1990. True, *Smith-Bey* and *Randle* did overrule prior circuit precedents in light of decisions from this Court. But those intervening decisions were truly recent, having occurred within the preceding year. *See Smith-Bey*, 741 F.2d at 26 (1984 case overruling precedent in light of 1984 Supreme Court decision); *Randle*, 664 F.2d at 1066 (1981 case overruling precedent in light of 1981 Supreme Court decision).

rather is an active, ongoing disagreement that will not simply resolve itself over time and that requires this Court's intervention. The petition should be granted on this basis alone.

2. ***This Court's rulings do not undermine lower court decisions permitting immediate appeals of orders denying appointment of counsel***

Nothing in *Swint*, *Mohawk*, or *Digital Equipment* changed the legal landscape in a way that would prompt the Fifth, Eighth, and Federal Circuits to revisit their holdings.

a. Contrary to respondents' suggestion, Br. in Opp. 4-5, this Court did *not* announce in *Swint* and *Mohawk* that under the Rules Enabling Act, rulemaking is now the *sole* method for determining whether an order is an appealable collateral order, and that courts are now precluded from making that determination under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Rather, this Court stated that "rulemaking, 'not expansion by court decision,' [is] the *preferred* means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 130 S. Ct. at 609 (emphasis added) (quoting *Swint*, 514 U.S. at 48). Because these decisions did not foreclose the possibility that additional classes of orders may be held to be immediately appealable, they are unlikely to prompt (and have not prompted with respect to *Swint*) the Fifth, Eighth, and Federal Circuits to reconsider their precedents.

Moreover, contrary to respondents' categorical rule based on the Rules Enabling Act, the Court in *Swint* and *Mohawk* did exactly what respondents argue the Rules Enabling Act forbids: the Court considered whether the orders at issue were immediately appealable under the three traditional *Cohen* elements. *See Mohawk*, 130 S. Ct. at 606 (holding that "collateral order appeals are not necessary" under the third *Cohen* prong "to ensure effective review of orders adverse to the attorney-client privilege"); *Swint*, 514 U.S. at 42 (concluding that order denying summary judgment is not appealable because it is not final under the first *Cohen* prong and not unreviewable under the third prong).[2]

Since the Rules Enabling Act was amended in 1990, this Court has six times granted certiorari to address whether various orders are immediately appealable. *Mohawk*, 130 S. Ct. 599; *Osborn v. Haley*, 549 U.S. 225 (2007); *Will v. Hallock*, 546 U.S. 345 (2006); *Swint*, 514 U.S. 35; *Digital Equipment*, 511 U.S. 863; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). And twice the Court has—in the absence of rulemaking—extended the collateral order doctrine to include new categories

[2] Indeed, respondents' arguments are identical to the reasoning of the opinion concurring and concurring in the judgment in *Mohawk*. *See Mohawk*, 130 S. Ct. at 610 (Thomas, J., concurring in part and concurring in the judgment) ("I would affirm * * * on the ground that any 'avenue for immediate appeal' * * * must be left to the 'rulemaking process.' * * * We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine * * * .")

of orders, including once just three years ago. *See Osborn*, 549 U.S. 225 (order denying certification and substitution under the Westfall Act appealable as collateral order); *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. 139 (order denying State's claim to Eleventh Amendment immunity immediately appealable).

b. *Digital Equipment* likewise will not cause the Fifth, Eighth, and Federal Circuits to reconsider their precedents, contrary to respondents' claim, Br. in Opp. 6-8. These courts have already had a decade and a half to consider that decision.

Nor are respondents correct that *Digital Equipment* "swept aside" part of the rationale of the lower courts' decisions—that under the third *Cohen* element, an order denying appointment of counsel is effectively unreviewable after entry of final judgment. Br. in Opp. 6. Far from eviscerating that element, *Digital Equipment* established only that "a party's ability to characterize a district court's [pretrial] decision as denying an irreparable 'right not to stand trial' altogether" is not alone sufficient to make the order effectively unreviewable after trial. 511 U.S. at 871. That accords with the Fifth, Eighth, and Federal Circuit's decisions, because a pro se plaintiff seeking appointment of counsel does not wish to *avoid* trial but rather to *have* a trial with assistance of counsel.

Respondents appear to read *Digital Equipment* as categorically rejecting any argument that any pretrial order is effectively unreviewable on appeal

from final judgment. But subsequent decisions from this Court have made clear that respondents' reading is mistaken. *See Osborn*, 549 U.S. at 238 (order denying certification and substitution under Westfall Act "would be effectively unreviewable later in the litigation"); *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144 (order denying sovereign immunity satisfies third *Cohen* element).

To be sure, as respondents point out, Br. in Opp. 7, the D.C. Circuit did rely on *Digital Equipment* in its decision not to permit immediate appeals of orders denying appointment of counsel. *See Ficken v. Alvarez*, 146 F.3d 978, 981-982 (D.C. Cir. 1998). But that only highlights the depth and intransigence of the split in the circuits and the need for this Court to step in and resolve it.

3. *The Fifth, Eighth, and Federal Circuits have given no signal that they may revisit their holdings*

As respondents concede, Br. in Opp. 8 n.4, long after *Swint*, the Fifth and Eighth Circuits have continued to hold fast to their precedents permitting pro se parties to immediately appeal orders denying appointment of counsel. There is simply no reason to believe that they will suddenly reverse course in the future.

The Fifth Circuit, just last year, heard an appeal from an order denying counsel, vacated the order, and remanded with instructions to appoint counsel. *Sanchez v. Chapman*, 352 Fed. App'x 955, 958 (5th

Cir. 2009) (per curiam). *See also Medrano v. Thomas*, 99 Fed. App'x 521 (5th Cir. 2004) (per curiam) (vacating, on immediate appeal, order denying appointment of counsel). Since Congress amended the Rules Enabling Act in 1990, the Fifth Circuit has heard no fewer than nine immediate appeals from denials of appointment of counsel, without any hint that it may reverse course. *Sanchez*, 352 Fed. App'x 955; *Walls v. Kahoe*, 328 Fed. App'x 959 (5th Cir. 2009) (per curiam); *Garnett v. Midland Police Dep't*, 338 Fed. App'x 445 (5th Cir. 2009) (per curiam); *Hale v. Harrison Cnty. Bd. of Supervisors*, 275 Fed. App'x 362 (5th Cir. 2008) (per curiam); *Buesgens v. Snow*, 169 Fed. App'x 869 (5th Cir. 2006) (per curiam); *Reed v. Johnson*, 130 Fed. App'x 664 (5th Cir. 2005) (per curiam); *Lewis v. City of Rogers*, 115 Fed. App'x 723 (5th Cir. 2004) (per curiam); *Medrano*, 99 Fed. App'x 512; *Douglas v. City of Baton Rouge*, 71 Fed. App'x 376 (5th Cir. 2003) (per curiam).

Similarly, the Eighth Circuit continues to hear immediate appeals from denials of motions to appoint counsel for pro se litigants in civil cases. *See, e.g.*, *Swackhamer v. Scott*, 276 Fed. App'x 544 (8th Cir. 2008) (per curiam); *Lane v. Astrue*, 279 Fed. App'x 421 (8th Cir. 2008) (per curiam); *Nelson v. Shuffman*, 476 F.3d 635 (8th Cir. 2007) (per curiam). The Federal Circuit likewise has not revisited its holding in *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988).

Respondents posit that the only reason these circuits have not yet overruled their longstanding

precedents is that they have not yet been asked to do so. Br. in Opp. 8 n.4. But that argument proves too much. If no litigant in the 20 years since the Rules Enabling Act's amendment has suggested that those precedents are no longer viable, then respondents' argument that a future litigant is likely to do so and that these courts are likely to overrule their well-established precedents simply has no traction. This Court should step in and resolve the split.

B. This Case Is An Ideal Vehicle To Resolve The Conflict Of Authority

Respondents do not contest that the question presented often evades this Court's review. As explained in the petition, all thirteen circuits have now decided the issue, which greatly diminishes the likelihood of its being squarely addressed in the future by a court of appeals. Moreover, pro se litigants whose interlocutory appeal of the denial of counsel is dismissed for lack of jurisdiction are unlikely to understand that that dismissal is reviewable by this Court. And in those cases where the court of appeals holds in an interlocutory appeal that counsel should be appointed, there is little incentive for the opposing party to seek this Court's review. Pet. 21. Accordingly, this case presents a rare, unique opportunity for this Court to intervene.

Instead, respondents attempt to portray this case as a poor vehicle. They assert that the district court's use of the phrase "at this time" indicates that the court may later decide to appoint counsel, possibly

mooting this case, and that the ultimate issue in this case—whether petitioner was incarcerated beyond his release date—has already been decided. Br. in Opp. 9-10. Respondents are wrong on both counts.

1. ***Respondents' argument that the denial of counsel would become moot if the district court were to appoint counsel later goes to the merits of the question presented rather than making this case a poor vehicle***

The fact that the district court used the phrase "at this time" in its order denying counsel, Pet. App. 4a, does not make this case any less worthy of certiorari. Rather, it simply goes to the finality of the order, which, on the merits, is the first element under *Cohen*, 337 U.S. at 546 (decision must "finally determine claim[ ] of right"). Thus, the impact of a phrase such as "at this time," and more generally the theoretical possibility of appointing counsel later in the case, is an issue for this Court to consider *after* the petition is granted, not a reason to deny certiorari.

Indeed, for the same reasons raised by respondents, there is conflicting authority regarding whether denial of a request for appointed counsel is conclusive under the first prong of *Cohen*. *Compare Holt v. Ford*, 862 F.2d 850, 852 (11th Cir. 1989) ("the denial of appointed counsel usually indicates 'nothing more than that the district court is not completely confident of the propriety of [court appointed counsel] *at that time*'" (brackets in original; emphasis added) (quoting *Gulfstream Aerospace Corp. v. Mayacamas*

Corp., 485 U.S. 271, 278 (1988)); *and Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762 (6th Cir.) ("orders denying appointment of counsel should be presumed tentative"), cert. denied, 474 U.S. 1036 (1985), *with Robbins v. Maggio*, 750 F.2d 405, 412 (5th Cir. 1985) (first *Cohen* element is met because "[i]f a defendant after denial of the motion chooses to go forward with his claim, he must do so without the assistance of appointed counsel"). That issue will be decided if this Court grants review.

Moreover, when a district court denies a pro se litigant's request for counsel, the litigant is forced to proceed on his own or abandon his case. That is true *even if* the court indicates that it may decide to appoint counsel later as the case progresses; the litigant is still exposed to the severe risks associated with litigating pro se. *See, e.g., Reynolds v. Cochran*, 365 U.S. 525, 532-533 (1961) ("[E]ven in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."). Even if the court appoints counsel once a case "reveals itself to be legally or factually more complex than the complaint had indicated," *Holt*, 862 F.2d at 852, it may be too late, as the pro se litigant may have already irreparably harmed his case. As petitioner's amicus explains, an inexperienced litigant proceeding pro se may inadvertently make admissions, reveal privileged information, or fail to pursue crucial discovery, any one of which might create an insurmountable advantage for the other side that cannot be remedied on appeal. *See* Amicus Br. of Alliance for Justice 5-6; Pet. 18-20.

2. *Respondents' arguments as to the merits of petitioner's claim are irrelevant*

Respondents also argue that petitioner's Section 1983 claim lacks merit, contending that he is bound by the Virginia Circuit Court's decision to dismiss petitioner's habeas petition, in which that court concluded that he was not incarcerated beyond his release date. Br. in Opp. 9-10.

Respondents' argument about the merits of petitioner's Section 1983 claim is beside the point. It goes only to the ultimate success of petitioner's claim and not to the procedural question presented here—whether petitioner may immediately appeal the denial of counsel. Indeed, the Fourth Circuit's decision demonstrates that it is a merits question irrelevant to the question presented. Pet. App. 9a n.2 ("Because the issue before us is limited to the legal question of whether Wilson's § 1983 claim is cognizable, we leave the issue of whether the Virginia Circuit Court's decision moots Wilson's claim for the district court to determine on remand."). If this Court grants review, it will not need to address the viability of petitioner's Section 1983 claim in light of the state habeas ruling.

In any event, petitioner has strong arguments that he is not bound by the prior state decision. Under Virginia law, collateral estoppel is inapplicable unless there is mutuality of the parties. *Scales v. Lewis*, 541 S.E.2d 899, 901 (Va. 2001). But the parties in petitioner's habeas case—the State and state officials in their official capacities—are not the

same as in this Section 1983 case—state officials in their individual capacities. *See Andrews v. Daw*, 201 F.3d 521, 526 (4th Cir. 2000) ("a government official in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata"); 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4458, at 571 (2d ed. 2002) ("an official who has litigated in his official capacity is not precluded from relitigation in his personal capacity"). Moreover, the fact that the state habeas ruling was based on two alternative grounds—both that petitioner's claim was procedurally barred and that it was "also without merit," 4th Cir. Dkt. (No. 07-6347) 68 at 8-9—will preclude the application of collateral estoppel here if the alternative ground is not "essential" to the ruling. *Glasco v. Ballard*, 452 S.E.2d 854, 855 (Va. 1995) (requirement for collateral estoppel is that issue "must have been essential to the prior judgment"); *cf.* 18 Wright, *supra*, § 4421, at 537-539 & n.1 (stating the analogous federal requirement).

More importantly respondents' argument demonstrates precisely why this Court should grant the petition. This case involves complex issues that would be confusing to most pro se litigants. The doctrines of res judicata and collateral estoppel involve multiple requirements that present difficult issues even for practitioners. Given the legal gauntlet that cases like this present for pro se litigants, the appointment of counsel can often be outcome determinative, and is thus of paramount importance.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

LEE O. WILSON, JR.,

Petitioner,

v.

GENE M. JOHNSON, ET AL.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE ALLIANCE FOR JUSTICE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

Alliance for Justice ("AFJ") is a national association of over 100 organizations dedicated to advancing justice and democracy. For more than 30 years, AFJ has been leading the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil, and women's rights, children, senior citizens, and other groups. AFJ is premised on the belief that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives.

In this case, AFJ is particularly concerned with the inability of a pro se litigant to have his or her appeal immediately heard when denied counsel. The lack of an immediate appeal will often irreparably damage a pro se litigant's case and will discourage litigants from making their voices heard in the courts.[1]

SUMMARY OF ARGUMENT

Congress enacted 28 U.S.C. 1915(e)(1) to enable district courts to appoint counsel for certain civil pro se litigants, thus recognizing that the fair admini-

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[1] This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

stration of justice is sometimes dependent on appointment of counsel in civil actions. H.R. Rep. No. 1079, 52nd Cong., 1st Sess. 1 (1892) (stating that the statute was designed "to open the United States Courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under their rules."). Three courts of appeals have held that denial of a request for appointment of counsel should be immediately appealable under the collateral order doctrine because it is "too important" to wait for subsequent review and also "too independent" of the underlying matter. The reasons for this are both intuitive and supported by empirical evidence: pro se litigants who are denied appointment of counsel can irreparably harm their case if they are forced to proceed with trial without the advice of counsel. An inexperienced pro se litigant can make admissions that prejudice their case, reveal privileged information, neglect to make time-sensitive discovery, or simply run out of resources before the end of the trial, making an appeal of no value. Requiring all pro se litigants to prosecute a civil claim with little chance of success before the trial court, and then asking the pro se litigant to appeal the outcome on the merits *and* the non-appointment of counsel on appeal will work injustice on many litigants with serious claims.

Immediate appeal of non-appointment decisions also will benefit the administration of justice because research shows that judges often deviate from their traditional neutral role when dealing with pro se litigants. Judges are forced to slow down proceedings and often offer disproportionate help to pro se litigants because of their lack of knowledge, working

an injustice on all parties to the proceeding. Procedural rules are sometimes even relaxed to accommodate pro se litigants.

ARGUMENT

Section 1915(e)(1) authorizes district courts to appoint counsel in a civil case for parties who cannot afford counsel. This case presents a significant question that has been addressed by all thirteen courts of appeals and has not yielded a common answer but has evaded review by this Court: Whether the denial of the appointment of counsel is an immediately appealable order under the collateral order doctrine. The collateral order doctrine allows appeals from "a small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

I. DENIAL OF COUNSEL IS TOO IMPORTANT AND TOO INDEPENDENT TO EVADE IMMEDIATE REVIEW

The Court has recognized the right of indigent parties to have their day in court. In *Roberts v. United States District Court*, 339 U.S. 844 (1950), the Court held that denial of *in forma pauperis* status is immediately appealable. Denial of *in forma pauperis* status and the denial of appointment of counsel are similar in that they both may effectively dispose of

the case for the indigent party. As the Court noted in *Powell v. Alabama*, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. 45, 68-69 (1932).

Congress recognized the importance of appointing counsel for certain pro se litigants in civil cases by adding Section 1915(e)(1) to Title 28, enabling district court judges to appoint counsel in certain circumstances. Thus, both Congress and this Court agree that certain pro se litigants warrant appointment of counsel. Three courts of appeals have concluded that denial of the appointment of counsel in civil actions is "too important" and "too independent" to be denied collateral review. *See Lariscey v. United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405, 407 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984). One court of appeals, the Ninth Circuit, has held that appellate jurisdiction rests on the type of claim presented. *See Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986). The nine courts of appeals that have reached the opposite conclusion focus on the ability of the district court to correct an error later, *see, e.g., Miller v. Simmons*, 814 F.2d 962, 965-967 (4th Cir.), cert. denied, 484 U.S. 903 (1987), or on the ability for an appellate court to review the matter after the case is over. *Id.* at 967; *Smith-Bey v. Petsock*, 741 F.2d 22, 24-26 (3rd Cir. 1984); *see Ficken v. Alvarez*, 146 F.3d 978, 982 (D.C. Cir. 1998). But these courts of ap-

peals misapprehend the challenges that pro se litigants face in prosecuting their claim.

In 2009, 71,543 civil cases were filed pro se in federal court, amounting to 25.8% of all cases.[2] In addition, 28.4% of appeals from bankruptcy court and 21.9% of appeals from administrative agencies were filed pro se. *Id.* Federal courts have recognized the increasing number of pro se litigants and many courts have begun to set up legal centers in courthouses to provide advice and services for pro se litigants. *See* Amanda Bronstad, *Federal Courts React to Tide of Pro Se Litigants*, The National Law Journal (March 9, 2009). Most pro se litigants in federal court are pursuing employment claims such as violations of the Americans With Disabilities Act and other anti-discrimination statutes. *Id.* The overwhelming majority of pro se litigants are poor and proceed pro se simply because they do not have the money or adequate knowledge to find a lawyer. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 Wm. & Mary L. Rev. 737, 756 (2002). Because they are not schooled in "the science of law," *Powell v. Alabama*, 287 U.S. at 69, pro se litigants often make critical errors that prejudice their claim and thus poison the proceeding such that denial of counsel would be rendered "effectively unreviewable" on appeal.

For example, a civil pro se litigant may make admissions that are prejudicial to the case or reveal

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[2] James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*. Washington: Administrative Office of the United States Courts, 2009 <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport.aspx>.

privileged information or case strategy, giving the other side an insurmountable advantage. Pro se litigants also may fail to interview witnesses or pursue adequate discovery, omissions that may become fatal if time is of the essence. Equally significant, a pro se litigant may drastically misvalue her claim. For example, if a plaintiff has an inflated view she may spurn fair offers to settle and thus waste judicial resources. If the plaintiff undervalues her claim, she may agree to an unfair resolution that favors the defendant and cannot be corrected on appeal. Given all the myriad challenges of the judicial system, many pro se litigants, even those with meritorious claims, may also simply choose to withdraw their case due to the heavy demands of a district court proceeding. These are but a few of the tactical errors a pro se litigant may make that are irrelevant to the merits of her claims yet may render them unreviewable on appeal.

It is both noteworthy and not surprising that a large number of studies have shown that parties are much more likely to be successful when represented by an attorney than when proceeding pro se. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 Clearinghouse Rev. 271-280, 280 (July-August 2006). The American Bar Association reported that "persons with qualified and competent legal representation secure relief at far higher rates than pro se litigants."[3] The risk of

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[3] ABA Report, *The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees*, ABA Resolution Adopted by the House of Delegates (Feb. 13, 2006) <http://www.abanet.org/poladv/priorities/immigration/107a_righttocounsel.doc> (in 2003, only 14 percent of non-detained

mistakes continues after the district court proceeding ends. A pro se litigant who unsuccessfully pursued a claim may not pursue an appeal, thinking that their failure was due to the merits of the case and not their mistakes in litigating the claim.

Certainly, the number of unsuccessful pro se cases includes many pro se litigants who cannot secure counsel because their claims are unmeritorious or frivolous. But it is a mistake to assume that pro se litigants with meritorious claims will find counsel, an assumption that reflects a view that an "efficient judicial market" will marry up a meritorious claim with counsel. *See, e.g., McKeever v. Israel*, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting) ("Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner's claim. If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer."). Given the lack of education, resources and world experience of nearly all pro se litigants, *see Federal Courts React to Tide of Pro Se Litigants*, even pro se litigants with meritorious claims may find it difficult to find counsel.

This case is important because it highlights a glaring flaw in our legal system that has divided the courts of appeals. Pro se litigants denied counsel may for all practical purposes lose their right of appeal by irreparably damaging their case. This flaw is becoming all the more relevant with the

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asylum seekers without counsel were granted asylum in comparison to 39 percent with counsel; and for detained asylum-seekers 3 percent gained asylum without counsel compared to 18 percent success with counsel).

increasing number of pro se litigants in federal courts.

II. THE PREVALENCE OF A LARGE NUMBER OF UNTUTORED PRO SE LITIGANTS UNDERMINES THE ADVERSARIAL NATURE OF THE JUDICIAL SYSTEM

The administration of justice also will benefit from counsel appointed for certain pro se litigants in civil proceedings. Empirical evidence has repeatedly shown that judges often deviate from their role as a neutral adjudicator in cases involving pro se litigants. This tendency undermines the adversarial nature of our legal system and creates unfairness and inefficiency for *both* parties. While application of the collateral order doctrine to denials of counsel will not completely alleviate this problem, it will lessen the number of judicial proceedings that do not adhere to the model of a neutral adjudicator and parties represented by effective counsel. This is not an argument for judicial efficiency, but rather a call for improvements to the integrity of the judicial system.

In a study on pro se cases, the Boston Bar Association found that in pro se cases "judges and court personnel are caught between a duty to be impartial and a desire to see justice done." Boston Bar Association Task Force on Unrepresented Litigants, *Report on Pro Se Litigation*, i Boston Bar Association (1998). Notably, judges spend significantly more time on pro se litigants than other parties and court clerks often find themselves becoming tutors to pro

se litigants by helping them comply with court rules. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 Ford. L. Rev. 1987, 2014-2016 (1999). No matter how hard a judge may try to remain neutral, it is inevitable that the judge will spend significant time answering pro se litigants' questions and giving them undue assistance, especially because pro se litigants often desire that every conceivable position be explored by the court, even those that are plainly unmeritorious.

Having judges wear two hats — one of neutral adjudicator and one of patient counselor or teacher — runs contrary to our adversary process. Indeed, judges also are often more lenient with pro se litigants on procedural rules and deadlines. *See, e.g.*, *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987) (holding that courts "provide a pro se litigant with notice of the deficiencies in his or her complaint" to ensure that the litigant uses the opportunity to amend effectively). The Boston Bar Association study also showed that without their own interlocutor, pro se litigants often become frustrated because of unrealistic expectations about the justice system, necessitating the judge to explain the result or else undermining public respect for the judicial system when pro se litigants are turned away for reasons they do not understand.

In the absence of counsel, district courts often have difficulty discerning pro se plaintiffs' claims, even where they may have merit, and court personnel must therefore spend more time than usual to ascertain the allegations and reach legally correct conclusions. Judges are also often tempted to correct the errors of a pro se litigant where they would not do

the same with a regular attorney. The Honorable Beverly W. Snukals and Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices From a Judge's Perspective*, 42 U. Rich. L. Rev. 93, 97 (2007). Case management without counsel present is often more difficult because pro se parties do not understand the discovery rules. One federal judge stated that in the past decade, "I have only had three pro se cases go to trial." *Report on Pro Se Litigation* at 25.

Finally, pro se litigants may be apt to become more emotional than represented parties and have difficulty observing courtroom decorum, creating a circus-like atmosphere in the courtroom. *See Kay v. Ehrler*, 499 U.S. 432 (1991) ("[A pro se litigant] is deprived of the judgment of an independent third party in framing the theory of the case . . . and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom."). These spectacles are inimical to the pursuit of the justice and reduce the public's respect for the judicial system.

Allowing pro se litigants to appeal denial of counsel under the collateral order doctrine will reduce the number of these one-sided trials, and as an added benefit may help dispose of frivolous claims more quickly. Because of their lack of understanding of courtroom procedure pro se litigants may often feel they are being denied justice because the district court is biased against them. *Report on Pro Se Litigation*, at 4. An immediate disposition by an appellate court of a request for counsel has the advantage of either putting counsel in place where the appellate court finds there is good cause for an appointment, or conversely where the immediate appeal is denied, that will impress upon pro se

litigants that they need to proceed alone or not at all with their civil claim.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

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